12-18-2007

Melton v. State Appellant's Brief Dckt. 33442

IN THE SUPREME COURT OF THE STATE OF IDAHO

RAYMOND J. MELTON,	)	
	)	
Petitioner-Appellant,	)	NO. 33442
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE BARRY WOOD
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ERIK R. LEHTINEN
Deputy State Appellate Public Defender
I.S.B. # 6247
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

In 2003, Raymond Melton was convicted and sentenced for lewd conduct with a child under the age of sixteen. His sentence was affirmed on direct appeal in 2004.

Also in 2004, Mr. Melton filed a petition for post-conviction relief asserting numerous claims for relief, including certain claims related to his assertion that his minor victim's preliminary hearing testimony and other statements had been coerced and coached by the State. Mr. Melton was appointed counsel and provided an evidentiary hearing; however, his post-conviction counsel failed to offer adequate evidence (such as the testimony of the victim, her mother, or any of the persons who were involved in coercing/coaching her testimony) at the evidentiary hearing to allow Mr. Melton to prevail on his coercion/coaching-related claims.

In 2006, just months after his first post-conviction case was finally resolved, Mr. Melton filed a successive petition for post-conviction relief and again requested the appointment of counsel. In his successive petition, Mr. Melton reiterated his claims regarding the State's coercion/coaching of his victim and asserted that his successive petition was properly filed because his post-conviction counsel had inadequately asserted those claims in his first post-conviction case. He supported his successive petition not only with his own affidavit, but with two letters from his victim stating that she had lied at the behest of the State, and that she had done so because of the harassment and intimidation of the prosecutor and other members of the prosecution team.

Without addressing Mr. Melton's motion for appointment of counsel, the district court summarily dismissed Mr. Melton's successive petition. Mr. Melton then initiated the present appeal.

On Appeal, Mr. Melton contends that the district court erred in two respects: first, the district court erred in failing to grant, or even rule upon, his motion for appointment of counsel before summarily dismissing his successive petition; second, the district court erred in summarily dismissing his successive petition. Mr. Melton contends that these errors necessitate a remand of his case to the district court for appointment of counsel and an evidentiary hearing on his claims.

Statement of Facts and Course of Proceedings

On September 12, 2003, pursuant to a plea agreement, Raymond Melton pled guilty to a single count of lewd conduct with a minor under sixteen for having sexual contact with his daughter, C.M.. (*Melton I*, R., pp.22-23; *Melton I*, Plea Tr., p.9, Ls.11-15.)[1] On December 16, 2003, Mr. Melton was sentenced. (*See generally Melton I*, R., pp.25-29; *Melton I*, Sent. Tr.) Ultimately, the district court imposed a unified sentence of life, with twenty-five years fixed. (*Melton I*, Sent. Tr., p.55, Ls.11-13; p.59, Ls.2-5.)

---

[1] Mr. Melton pursued a direct appeal of his underlying conviction. That case, Supreme Court Case No. 30348, is referenced herein as *Melton I*. All references to the record in *Melton I* are identified by the prefix "*Melton I*." The transcripts in *Melton I* are further delineated as pertaining to either Mr. Melton's September 12, 2003, change of plea hearing ("Plea Tr."), or his December 16, 2003, sentencing hearing ("Sent. Tr.").

Following his unsuccessful direct appeal, Mr. Melton filed a petition for post-conviction relief and, after that petition was denied, appealed the denial of his petition. That case, Supreme Court Case No. 31626, is referenced herein as *Melton II*. All references to the record in *Melton II* are identified by the prefix "*Melton II*." There was only one transcript in the record in Melton II; thus, that transcript is referenced simply as "Tr."

On September 8, 2006, this Court issued an order taking judicial notice of the appellate records in both *Melton I* and *Melton II*.

On December 22, 2003, Mr. Melton filed a Notice of Appeal initiating a direct appeal. (*Melton I*, R., pp.41-43.) On appeal, Mr. Melton argued that the district court's sentence was excessive; however, the Idaho Court of Appeals disagreed, affirming that sentence. *State v. Melton*, 2004 Unpublished Opinion No. 583 (Aug. 13, 2004).

In the meantime, on April 19, 2004, while still awaiting a decision on his direct appeal, Mr. Melton, acting *pro se*, filed a petition for post-conviction relief (*hereinafter*, Original Petition), an affidavit in support of the Original Petition, and a memorandum of law in support of the Original Petition. (*See generally Melton II* R., pp.1-5 (petition); 6-35 (memorandum); *Melton II* Affidavit of Facts in Support of Post-Conviction Petition (*hereinafter,* First Affidavit).[2]) In his Original Petition and its supporting documents, Mr. Melton asserted approximately 18 claims for relief. (*See generally Melton II* R., pp.1-5 (petition); 6-35 (memorandum); *Melton II* First Affidavit.) Some of those claims stemmed directly from his contention that C.M. had been forced by the prosecutor to perjure herself at Mr. Melton's preliminary hearing. Those claims are summarized below:

- The prosecution engaged in misconduct by forcing C.M. to testify against her will at Mr. Melton's preliminary hearing and by instructing her "on what exactly to say and how to say it . . . ." (R., pp.17-18; First Affidavit, pp.1G-1H; *see, e.g.*, First Affidavit, exs. (preliminary hearing transcript excerpts).)
- The prosecution (and the district court for not intervening) violated Idaho law by forcing C.M. (through intimidation and harassment) to testify against her will at Mr. Melton's preliminary hearing, and by telling her what to say while on the witness stand. (R., pp.23-24, 25, 26-27; First Affidavit, pp.1F, 1K-1L.)

[2] The Supreme Court ordered the First Affidavit augmented into the record in *Melton II* in its order of November 9, 2005.

- The district court erred by allowing C.M. to be accompanied on the witness stand during Mr. Melton's preliminary hearing by the same state agent who coerced her to testify. (R., p.25; First Affidavit, pp.1G-1H.)

On June 29, 2003, Mr. Melton, this time through counsel, filed an Amended Petition for Post Conviction Relief (*hereinafter*, Amended Petition), and a supporting affidavit (*hereinafter*, Second Affidavit).[3] (*Melton II* R., pp.36-38; *Melton II* Second Affidavit.) In his Amended Petition, Mr. Melton asserted that his guilty plea had not been knowingly, intelligently and voluntarily entered, and that he had received ineffective assistance of counsel in seven different regards. (*Melton II* R., p.37.) This Amended Petition did not explicitly re-assert Mr. Melton's claims concerning the State's manipulation of C.M.'s testimony (*see Melton II* R., pp.36-37); however, it explicitly stated that its purpose was limited to "putting into proper *form*, Petitioner's earlier petition . . . ." (*Melton II* R., p.37 (emphasis added).) Indeed, the same district court later noted (in a subsequent proceeding) that "[t]his Amended Petition also specifically incorporated all arguments raised in Melton's original Petition . . . ." (R., p.91.)

In the affidavit filed with his Amended Petition, Mr. Melton provided additional detail in support of some of his post-conviction claims, but he did not further address his assertions regarding the State's manipulation of C.M.'s preliminary hearing testimony. (*See Melton II* Second Affidavit, pp.1-2.) However, again, it appears that Mr. Melton's affidavit was intended to augment, not supplant, his Original Petition and the documents filed in support thereof. (*See Melton II* R., p.37 ("This Amended Petition amends, by putting into proper form, Petitioner's earlier petition . . . . The allegations and facts set forth in that petition, together with the Affidavit filed concurrently herewith, are all to be

considered by the Court."); *see also* R., p.91 ("This Amended Petition also specifically incorporated all arguments raised in Melton's original Petition . . . .").)

On January 4, 2005, the district court held an evidentiary hearing on Mr. Melton's post-conviction claims. (*See generally Melton II* Tr., pp.63-140.) At that hearing, Mr. Melton's post-conviction counsel called only three witnesses: (1) Mr. Melton himself; (2) Mr. Melton's sister, Linda Mahnke; and (3) Mr. Melton's trial counsel, Severt Swenson. (*See generally Melton II* Tr., pp.63-140.)

In his testimony, which touched on many different topics, Mr. Melton discussed—usually in oblique terms, but sometimes fairly directly—his contentions that C.M. was a victim of the State's harassment and intimidation, and that her testimony at his preliminary hearing had been coached, cued, and influenced by the State. (*See, e.g., Melton II* Tr., p.65, Ls.8-12 (testifying that his trial counsel told him that there was no way he could defend against the testimony that had been forced upon C.M.), p.68, L.20 – p.69, L.1 ("I was trying to figure out where in the heck I stood, know what type of defense I had after seeing what was done to my daughter in this courtroom and the preliminary hearing, and trying to figure out how I could help defend my daughter's rights against the stuff that she was going against herself."); p.69, Ls.11-17 (testifying that he had been told by his wife, who is also C.M.'s mother, that C.M. had been questioned at school and, based on that, he speculated that C.M. had been pulled out of her classroom by Alisha Moon, the coordinator for Academy Family Services, isolated, and forced to submit to questioning); p.69, Ls.18-22 (testifying that, while speaking to his wife on the telephone, he could hear a case worker yelling at C.M.,

[3] The Supreme Court ordered the Second Affidavit augmented into the record in *Melton II* in its order of November 9, 2005.

demanding that C.M. tell her what she wanted to hear); p.71, L.21 – p.72, L.1 (testifying that he felt compelled to plead guilty, in part, because of "fear and fraud"); p.77, Ls.2-15 (recounting the events of his preliminary hearing and explaining that when C.M. ran to her mother crying and saying she did not want to testify, the prosecutor, Officer Greer, and Ms. Moon pulled C.M. away from her mother, sat her down, towered over her, and told her as follows: "You have got to do this. You have got to tell the judge where your daddy put his penis at."); p.78, Ls.16-19 (testifying that when Ms. Moon was sitting near C.M. while C.M. was testifying at Mr. Melton's preliminary hearing, it appeared that Ms. Moon was forcing C.M.'s testimony against Mr. Melton); p.76, Ls.24-25 (testifying that he spoke to his attorney about the prosecutor's actions at the preliminary hearing; p.76, Ls.21-23; p.78, Ls.13-19 (testifying that he believed that the actions of the prosecutor, Officer Greer, and Ms. Moon at the preliminary hearing amounted to coaching, cueing, "informing," and attempting to "inform"[4] C.M.'s testimony in violation of Idaho law, and that these actions constituted prosecutorial misconduct); p.91, L.9 – p.92, L.2 (admitting, in response to cross-examination, that he had not raised any claims of prosecutorial misconduct on direct appeal); p.95, Ls.5-10, 17-24 (testifying that he pled guilty because he did not "want to put her [C.M.] through the stuff that you [the prosecutor] were telling her to say"), p.95, L.25 – p.96, L.23 (testifying that C.M. lied at Mr. Melton's preliminary hearing, and in a letter she supposedly wrote for his sentencing hearing); p.98, Ls.8-13 (testifying that he believed his counsel was ineffective for failing to investigate "illegal stuff that you were doing in this courtroom").

[4] Mr. Melton probably meant to say "influenced," not "informed." (*See* First Affidavit, p.1K (asserting that coaching, cueing, influencing, and attempting to influence a witness is a violation of Idaho law).)

Ms. Mahnke testified, in relevant part, that she was present at Mr. Melton's preliminary hearing and, during a recess, after C.M. ran to her mother crying, the prosecution team told her that she had to testify. (*Melton II* Tr., p.103, L.13 – p.104, L.9.) Ms. Mahnke further testified that just before the recess ended and the preliminary hearing resumed, the prosecutor told C.M. that, "[y]ou got to remember to tell the judge that your dad touched your butt with his penis," and that C.M. "kind of looked at him like 'what is a penis.' Because she had never heard that word before . . . . But anyway, I remember him telling her, 'You have to tell the judge that your dad touched your butt with his penis.'" (*Melton II* Tr., p.104, L.17 – p.105, L.7.)

When Mr. Swenson testified, Mr. Melton's post-conviction attorney never asked him about Mr. Melton's preliminary hearing, the State's alleged intimidation of C.M., or the State's alleged coaching, curing, or influencing C.M.'s testimony. (*See generally Melton II* Tr., p.106, L.1 – p.118, L.7.) Nor did Mr. Melton's post-conviction counsel ever call C.M., C.M's mother, the prosecutor, Officer Greer, or Ms. Moon to testify as to such matters. (*See generally Melton II* Tr., pp.63-140.)

At the conclusion of the January 4, 2005 evidentiary hearing, the district court denied Mr. Melton's petition in whole. (*Melton II* Tr., p.140, Ls.2-5.) In doing so, it specifically addressed Mr. Melton's contention that C.M.'s testimony had been both compelled and coached, concluding that Mr. Melton's claims failed because Mr. Melton failed to prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).[5] (*Melton II* Tr., p.133, L.14 – p.134, L.9.)

[5] The district court's reasoning was as follows:

> The question about the prosecutor coached the witness, or coerced her, you told the prosecutor—I mean your defense counsel that you were guilty. So I don't know what—how—

On January 13, 2005, the district court issued an order memorializing its denial of Mr. Melton's petition (*Melton II* R., p.42), as well as its Additional Findings of Fact and Conclusions of Law and Order Following Court Trial On Petition For Post Conviction Relief (*Melton II* R., pp.44-55). In the latter document, the district court again addressed Mr. Melton's claims of coercion and coaching, apparently under the continued belief that Mr. Melton could not establish prejudice because he was, in fact, guilty.[6] (*See Melton II* R., p.50.)

> I cannot make a finding that there's—the result in this case would be any different. Even if somehow you could get by the first level of the Strickland test, I will make the finding here, based upon a totality of the entire record, that the result wouldn't be any different.
>
> Because one of two things would have happened at the trial, in essence. The girl would get on the stand and say whatever she's going to say at the trial. Your daughter. You would then have to make an election to either get on the stand and challenge that, or not challenge it.
>
> And the state already had the interviews with the police and others, as well as the preliminary hearing transcript testimony. So I don't know how—I can't make any finding that the result somehow would be any different.

(*Melton II* Tr., p.133, L.14 – p.134, L.9.) This reasoning, however, should bring at least two concerns to mind.

First, it is odd that the district court applied *Strickland*, which provides the analytical framework for evaluating claims of ineffective assistance of counsel, to Mr. Melton's claims. Even though Mr. Melton's *pro se* Original Petition, if construed liberally, could be viewed as presenting a claim of ineffective assistance of counsel (for failing to object to the State's intimidation and coaching of C.M.), his allegations must also be construed as presenting a prosecutorial misconduct claim since that is how at least one of his claims was explicitly styled.

Second, the district court's logic appears flawed. In analyzing the "prejudice" question, the district court seems to have concluded that, had Mr. Melton's case gone to trial, even if C.M. testified that Mr. Melton had done nothing wrong, Mr. Melton would nevertheless have inevitably been convicted based upon: (1) C.M.'s prior inconsistent statements, some of which the district court speculated were in police reports which do not appear to have actually been before the court, and others of which were made at Mr. Melton's preliminary hearing (and, of course, were alleged to have been coerced and fraudulent); and (2) Mr. Melton's privileged communications with his trial counsel. (*See Melton II* Tr., p.133, L.14 – p.134, L.9.) It is difficult to imagine, however, how that would be sufficient to sustain a conviction.

[5] Although the Notice and Order of Appointment was filed by the district court, it was served upon the Idaho Supreme Court and should, therefore, be in this Court's file.

[6] With regard to the coercion/coaching allegations, the district court wrote as follows:

> 1. Melton also alleges that his counsel was deficient because he allowed the victim's testimony to be coerced at the preliminary hearing. . . .
>
> 2. The Court finds this position to be without merit. Melton told his counsel he was guilty. Melton told the judge at the change of plea he was guilty. Melton cannot control the victim's testimony.

On February 9, 2005, Mr. Melton filed a Notice of Appeal which was timely from the district court's oral denial of his petition, as well as its written findings of fact and conclusions of law. (*See generally Melton II* R., pp.58-59.) Shortly thereafter, the district court appointed the State Appellate Public Defender (*hereinafter*, SAPD) to represent Mr. Melton in the prosecution of that appeal (*Melton II* Notice & Order of Appointment (Feb. 22, 2005)).

On September 7, 2005, having found no non-frivolous issues to present on appeal, the SAPD moved to withdraw from its representation of Mr. Melton. (R., pp.29-30 (motion for leave to withdraw), pp.32-34 (affidavit in support of motion for leave to withdraw), pp.36-66 (memorandum in support of motion for leave to withdraw, explaining in detail why there were no non-frivolous issues on appeal).) With regard to Mr. Melton's claim of prosecutorial misconduct for the State's coercion and coaching of C.M., the SAPD articulated its view that Mr. Melton had failed to prove (at the evidentiary hearing) that C.M.'s testimony had been falsified at the behest of the State,[7] and that merely compelling a reluctant witness to testify does not amount to misconduct. (R., p.51.) With regard to Melton's claim that the State's coercion/coaching of C.M.'s testimony was a violation of law, the SAPD articulated its view that, even assuming Mr. Melton's allegations were correct, he did not identify any legal mechanism, other than the filing of a suppression, by which he could claim that he was aggrieved by the

---

(*Melton II* R., p.50.) Mr. Melton has many of the same concerns with these comments as he does with the oral comments made by the district court at the conclusion of the evidentiary hearing. In addition, Mr. Melton takes issue with the district court's assertion that he was trying to "control" C.M.'s testimony by bringing his post-conviction action since, although he might not have proven his claim that the State had coerced and coached C.M., there was certainly no evidence that *he* had done so.

[7] The SAPD did not endorse the analysis of the district court (which was articulated above). (*See* R., p.51.) Rather, it incorrectly perceived the district court's reasoning to be that the same as its own—that Mr. Melton had simply failed to prove his claim—and stated that "[g]iven this dearth of evidence, it

State's violation of the statutory rights of C.M. (R., pp.59-60.) Finally, with regard to Mr. Melton's claim that Ms. Moon, the same state actor who was coercing C.M.'s testimony, was erroneously allowed to accompany C.M. on the witness stand at Mr. Melton's preliminary hearing, the SAPD articulated its view that merely accompanying C.M. was consistent with I.C. § 19-3023 and that Mr. Melton had failed to prove that C.M.'s testimony had been falsified at the behest of the State,[8] and it further opined that, given that the facts underlying Mr. Melton's claim were known to him at the time of the evidentiary hearing, to the extent that they were objectionable, his post-conviction counsel should have objected and his appellate counsel should have raised the issue on direct appeal.[9] (R., pp.61-62.)

The SAPD's motion to withdraw was granted by the Supreme Court on November 2, 2005. (R., p.69 (order granting motion for leave to withdraw).) Thereafter, because Mr. Melton chose not to pursue a frivolous appeal by timely filing an Appellant's Brief, on January 25, 2006, the Supreme Court dismissed his appeal altogether. (R., p.71 (order providing Mr. Melton a deadline by which he was to file an Appellant's Brief and warning him that his failure to meet that deadline would result in dismissal of his appeal), p.73 (order dismissing Mr. Melton's appeal for his failure to timely file an Appellant's Brief).)

On April 24, 2006, just four months after the appeal of the denial of his first petition for post-conviction relief was dismissed, Mr. Melton filed a "Successive Petition for Petition and Affidavit for Post Conviction Relief" (*hereinafter*, Successive Petition)

---

cannot be said that the district court clearly erred in determining that Mr. Melton failed to prove his claim." (R., p.51.)

[8] Again, the SAPD misapprehended the district court's rulings, believing that the district court had denied Mr. Melton's claim for lack of proof.

(R., pp.1-4), a notarized "Memorandum of Law of the Petitioner and Affidavit of Facts in Support of Successive Post-Conviction Petition" (*hereinafter*, Third Affidavit) (R., pp.7-11), a Motion and Affidavit for Fee Waiver (Prisoner), and a Motion and Affidavit in Support for Appointment of Counsel.[10] In the memorandum/affidavit accompanying his Successive Petition, Mr. Melton asserted that his Successive Petition was proper under I.C. § 19-4908 (which provides that an individual may not file a subsequent petition for post-conviction relief "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised" previously) because, in previous post-conviction proceedings, his post-conviction counsel had failed to properly apprise the district court of the claims intended to be asserted or to present the evidence necessary to prove those claims. (R., p.8.) Specifically, Mr. Melton alleged that certain witnesses had written letters supporting Mr. Melton's claim that C.M.'s testimony had been coerced/coached and that these letters had been conveyed to Mr. Melton's post-conviction counsel,[11] that Mr. Melton had specifically requested that C.M., C.M.'s mother, Ms. Moon, Mr. Greer, and the prosecutor be called to testify about the coercion/coaching of C.M.'s testimony, and that post-conviction counsel had refused to offer the letters or the testimony of these individuals at Mr. Melton's evidentiary hearing. (R., p.9.) Mr. Melton also submitted two letters, signed by C.M., which, taken together, assert that: no one ever asked what

---

[9] The SAPD represented Mr. Melton on direct appeal as well.

[10] Mr. Melton's motion for a fee waiver and his motion for appointment of counsel are both attached to his Motion to Augment Record, which is filed contemporaneously with this brief.

[11] Although Mr. Melton went on to identify five individuals whom he believes his post-conviction counsel should have called to testify (C.M., C.M.'s mother, Ms. Moon, Mr. Greer, and the prosecutor) (R., p.10), it is not clear which of these individuals wrote the letters in question since only two letters were submitted in conjunction with the Successive Petition or the Third Affidavit (both of which were from C.M.) and it appears that one of those two letters was written on October 7, 2005, which was approximately ten

really happened with her father; she had been isolated from her mother (against her will) when first questioned about her father's actions and, during that questioning, she was very frightened; she was later told by the prosecution what to say on the witness stand at Mr. Melton's preliminary hearing; she was intimidated and threatened with removal from her mother's home if she did not say what the prosecution wanted her to say on the witness stand; she ultimately acceded to the prosecution's request, such that "most" of her testimony at Mr. Melton's preliminary hearing was false; and, later, she was told to exaggerate the details of her father's actions while writing a letter for the district court's consideration at Mr. Melton's sentencing hearing. (Evidence #2.)[12] Finally, Mr. Melton's Successive Petition briefly reiterated the claim, first raised in his Original Petition, that the prosecution's intimidation of C.M. and its suborning her perjury amounted to misconduct warranting post-conviction relief. (*See* R., pp.8-9.)

On May 31, 2006, the State filed an answer to Mr. Melton's Successive Petition. (R., pp.12-17; *see also* R., pp.19-75 (exhibits to the State's answer, illustrating the procedural history of the appeal of Mr. Melton's first post-conviction case).) Approximately a month later, on June 26, 2006, the State filed a motion for summary dismissal of Mr. Melton's Successive Petition (R., pp.81-82), as well as a memorandum in support of that motion (Brief in Support of Motion for Summary Dismissal of Successive Petition for Post-Conviction Relief (Jun. 26, 2006) (*hereinafter*, State's Memorandum)).[13] The State argued that Mr. Melton's Successive Petition should be

---

months after Mr. Melton's evidentiary hearing. Presumably, the letters in question were never submitted because they were still in the possession of Mr. Melton's prior post-conviction counsel.

[12] Along with his Successive Petition and his Third Affidavit, Mr. Melton submitted six packets of documents for the district court's consideration. Those six packets, labeled Evidence #1 – Evidence #6, are attached to Mr. Melton's Motion to Augment Record which is filed contemporaneously with this brief.

[13] The State's memorandum is attached to Mr. Melton's Motion to Augment Record, which is filed contemporaneously with this brief.

summarily dismissed because: (1) it was untimely under I.C. § 19-4902 because it was filed more than one year after issuance of the Remittitur in Mr. Melton's direct appeal (State's Memorandum, pp.7; 8-13)[14]; (2) Mr. Melton failed to establish a "sufficient reason" (as that term is used in I.C. § 19-4908) for filing a successive petition for post-conviction relief because he failed to raise a genuine issue of material fact as to post-conviction counsel's ineffectiveness (State's Memorandum, pp.7-8, 14-17); and (3) to the extent that Mr. Melton was trying to relitigate claims finally adjudicated in his first post-conviction case, those claims are barred by the doctrine of *res judicata* (State's Memorandum, pp.17-19).

On July 11, 2006, Mr. Melton, still acting *pro se*, filed a response to the State's motion for summary dismissal. (R., pp.83-87.) In that response, Mr. Melton reiterated his contentions that: (1) the evidence he submitted with his Successive Petition showed that the prosecution had intimidated and harassed C.M., intentionally causing her to give false testimony (R., pp.83, 86); (2) the State's actions were actually criminal under Idaho law (R., p.84); (3) his post-conviction counsel rendered deficient performance when he "failed to present key evidence to the court, which [he] had in his possession," and when he failed to "call key witnesses that would have provided the court with information of the misconduct of the prosecutor" (R., p.86); and (4) post-conviction counsel's deficient performance prejudiced Mr. Melton's post-conviction case (R., pp.86-87).

[14] The State argued that Mr. Melton's Successive Petition did not enumerate claims asserted in his initial post-conviction case and, therefore, did not "relate back" to the initial case and, thus, fell outside the one-year statute of limitation enumerated in I.C. § 19-4902. (State's Memorandum, pp.7; 8-13.)

On July 21, 2006, the district court, without holding a hearing of any kind[15] and without ever having ruled on Mr. Melton's motion for appointment of counsel (*see generally* R.), issued an order denying Mr. Melton's request for an evidentiary hearing and summarily dismissing Mr. Melton's Successive Petition.[16] (R., pp.89-103.) With regard to Mr. Melton's request for an evidentiary hearing, the district court concluded that the only evidence supporting Mr. Melton's contention that the prosecution coerced C.M. to perjure herself was an undated, "unsworn, and uncorroborated letter purporting to be from [C.M.], claiming that portions of her testimony was untrue or coerced," but that "this one piece of evidence on its own is not enough to justify an evidentiary hearing." (R., p.96.)

With regard to the State's motion for summary dismissal, the district court seems to have treated Mr. Melton's allegation of the ineffectiveness of his post-conviction counsel as an attempt to present a distinct claim for post-conviction relief (as opposed to simply a justification for the filing of a successive petition to re-raise the claim that had been inadequately raised in the prior post-conviction case). (*See* R., p.98 & n.4.) Although the district court recognized that an independent claim of ineffective assistance of post-conviction counsel is of questionable validity, it nevertheless went on to assume that such a claim was proper (R., p.98 n.4) and it dismissed Mr. Melton's Successive Petition on three other grounds: (1) Mr. Melton's claims regarding C.M.'s perjury "was already raised and decided in the previous post-conviction matter" and,

---

[15] Although he did not need to do so, before the State filed its motion for summary dismissal, Mr. Melton filed a motion specifically requesting an evidentiary hearing on his Successive Petition. (R., pp.76-77.) Interestingly, that motion reiterated Mr. Melton's request for the appointment of counsel. (R., p.77.)

[16] It is not clear why the district court treated Mr. Melton's request for an evidentiary hearing separately from the State's motion for summary dismissal since the key inquiry for both motions should have been whether Mr. Melton had raised a genuine issue of material fact which, if proven to be true, would entitle him to post-conviction relief. *See* I.C. §§ 19-4906, -4907.

because Mr. Melton's "own statements [to his trial counsel, at the change of plea hearing, and at the evidentiary hearing in his first post-conviction case] affirm his guilt of this crime, . . . there is no new justification for granting him the relief sought" (R., pp.98-100); (2) there is "little to no evidence" to support Mr. Melton's claims because Mr. Melton failed to prove the authenticity of the two letters from C.M. and, even if he had, those two letters do not prove that all of C.M.'s preliminary hearing testimony and victim impact statements were false (just most of them), and they do not "in way establish [Mr.] Melton's innocence" (R., pp.98, 100-02); and (3) there is no evidence that Mr. Melton's post-conviction counsel knew of C.M.'s letters prior to the January 4, 2005 evidentiary hearing (R., pp.98, 102-03).

On August 28, 2006, Mr. Melton filed a Notice of Appeal which was timely from the district court's order summarily dismissing his Successive Petition. On Appeal, Mr. Melton contends that the district court erred in two respects: first, the district court erred in failing to grant, or even rule upon, Mr. Melton's motion for appointment of counsel before summarily dismissing his Successive Petition; second, the district court erred in summarily dismissing his Successive Petition. Mr. Melton contends that these errors necessitate a remand of his case to the district court for appointment of counsel and an evidentiary hearing on his claims.

ISSUES

1. Did the district court err in failing to grant, or even rule upon, Mr. Melton's motion for appointment of counsel before summarily dismissing his successive petition for post-conviction relief?

2. Did the district court err in summarily dismissing Mr. Melton's successive petition for post-conviction relief?

ARGUMENT

I.

The District Court Erred In Failing To Carefully Consider, And Grant, Mr. Melton's Motion For Appointment Of Counsel

A. Introduction

Idaho law is clear: in a post conviction case, the district court must rule upon the petitioner's motion for appointment of counsel before summarily dismissing his petition. In this case, because the district court failed to do so, Mr. Melton asks that this Court vacate the summary dismissal order and remand his case.

In addition, Mr. Melton contends that his Successive Petition (along with its supporting materials) satisfies the standard for appointment of counsel, i.e., it raises the possibility of a valid claim. Therefore, Mr. Melton further requests that, assuming his case is remanded, this Court also order the district court to appoint counsel.

B. Standard Of Review

"A request for appointment of counsel in a post conviction proceeding is governed by Idaho Code § 19-4904, which provides that in proceedings under the UPCPA [Uniform Post-Conviction Procedures Act], a court-appointed attorney 'may be made available' to an applicant who is unable to pay the costs of representation. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court." *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004).

"When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower

court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) (quoting *Associates Northwest, Inc. v. Beets,* 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App.1987)).

C. The District Court Abused Its Discretion By Failing To Decide Mr. Melton's Motion For Appointment Of Counsel Before Summarily Dismissing His Successive Petition

In *Charboneau*, *supra*, the Idaho Supreme Court was faced with facts similar to those in this case: the petitioner filed a *pro se* petition for post-conviction relief and a motion for appointment of counsel; the State sought summary dismissal of that petition; the petitioner responded to the State's motion; and the district court granted the State's motion and summarily dismissed the petition without first addressing the petitioner's motion for appointment of counsel. *Charboneau*, 140 Idaho at 791, 102 P.3d at 1110. In that case, the Supreme Court held that the district court had abused its discretion because "the district judge should have first determined whether Charboneau was entitled to court-appointed counsel before denying the post-conviction relief on its merits." *Id.* at 793-94, 102 P.3d at 1112-13. Critical to this holding was the Court's recognition that *pro se* petitioners "cannot be expected to know how to properly allege the necessary facts," and, thus, should be given a meaningful opportunity to correct any defects in their petition—with the assistance of counsel—prior to any dismissal decision. *Id.* Thus, while *Charboneau* does not require that counsel be appointed in every post-conviction case, it does stand for the proposition that "[a]t a minimum, the trial court

must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition . . . ." *Id.* at 794, 102 P.3d at 1113.

In the present case, because Mr. Melton could not "be expected to know how to properly allege the necessary facts," and very well could have benefited from the assistance of counsel, the district court should have at least "carefully consider[ed]" his motion for appointment of counsel before dismissing his petition on its merits. Accordingly, this case demands at least the same result as was obtained in *Charboneau*—it should be remanded to the district court for a determination of whether Mr. Melton is entitled to the assistance of counsel and, if it turns out that he is, he should be provided with an opportunity to file an amended petition and/or whatever additional evidence or legal authority and argument that he might have. *See id.*

D. The District Court Abused Its Discretion By Failing To Grant Mr. Melton's Motion For Appointment Of Counsel Because Mr. Melton's Successive Petition Raised The Possibility Of A Valid Claim

Even if the district court was not required to have given careful consideration to Mr. Melton's request for appointment of counsel, such that its silence can be construed as a valid denial of Mr. Melton's motion, Mr. Melton submits that the district court abused its discretion nonetheless. In *Charboneau*, the Supreme Court held that a post-conviction petitioner is entitled to the appointment of counsel "unless the trial court determines that the post-conviction proceeding is frivolous." *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111 (quoting *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001)). It further held that the proceeding is not frivolous and, thus, counsel must be appointed, if the petitioner "alleges facts to raise the *possibility* of a valid claim . . . ." *Id.* at 793, 102 P.3d at 1112 (emphasis added).

Recently, in *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007), the Supreme Court had occasion to revisit the standard for appointment of counsel in post-conviction cases. In that case, the Court reaffirmed the *Charboneau* standard:

> In deciding whether the *pro se* petition raises the possibility of a valid claim, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims. Although "the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims," *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001), the court should appoint counsel if the facts alleged raise the possibility of a valid claim.

Swader, 143 Idaho at 654, 152 P.3d at 15. The *Swader* Court also made it clear that this standard is much lower than the standard for deciding petitions for post-conviction relief on their merits because, as had also been recognized in *Charboneau*, *pro se* petitioners generally cannot investigate or properly present their claims (regardless of whether those claims will ultimately be successful) without the assistance of counsel. *Id.* at 654-55, 152 P.3d 15-16.

In the present case, Mr. Melton contends that he has, at the very least, raised the possibility of a valid claim. As is set forth in Part II, below, he asserts that, even without the assistance of counsel, his Successive Petition was adequate to raise genuine issues of material fact warranting an evidentiary hearing. But, even if his latter contention is incorrect and this Court finds that he has not yet raised genuine issues of material fact warranting an evidentiary hearing, it should conclude that he has raised the *possibility* of a valid claim by offering evidence that the State's key witness' testimony was coerced and coached by the prosecution team, and that Mr. Melton's post-conviction counsel was alerted to this reality, but failed to pursue it and offer sufficient evidence of it at Mr. Melton's first evidentiary hearing.

II.

The District Court Erred In Summarily Dismissing Mr. Melton's Successive Petition For Post-Conviction Relief

A. Introduction

Under Idaho law, a petition for post-conviction relief (whether it be an original petition or a successive petition) cannot be summarily dismissed if it, along with its supporting materials, raises a genuine issue of material fact with regard to a claim which, if proven, would entitle the petitioner to relief. As is set forth in detail below, Mr. Melton contends that his Successive Petition was adequate to raise such a genuine issue of fact—not only as to the ineffectiveness of his post-conviction counsel, but also as his underlying claim of prosecutorial misconduct. Therefore, it was error for the district court to have summarily dismissed Mr. Melton's Successive Petition.

B. Summary Dismissal Standard

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter,* UPCPA) (I.C. §§ 19-4901 to -4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456, 808 P.2d at 375. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). However, the petition initiating post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim"; it "must be verified with respect to facts within

the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached." *Id.*; I.C. § 19-4903. "In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c).[17] In analyzing a post-conviction petition under this standard, the district court need not "accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Martinez*, 126 Idaho at 816-17, 892 P.2d at 491-92. However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner's allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646, 448 P.2d 649, 652 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982). But in doing so, it must

[17] Although this standard is set forth in section 19-4906(b), which deals with motions for summary disposition, it appears to apply to *sua sponte* dismissals as well. *See, e.g., Small*, 132 Idaho at 331, 971 P.2d at 1155 (discussing the standard for summary disposition under section 19-4906 *generally* as being whether a genuine issue of material fact has been presented).

still liberally construe the facts and draw reasonable inferences in favor of the petitioner, *Small*, 132 Idaho at 331, 971 P.2d at 1155.[18]

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331, 971 P.2d at 1155. If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

If the district court orders dismissal *sua sponte*, it must first give the petitioner twenty days' notice and allow the petitioner to respond to the notice. I.C. § 19-4906(b). The purpose of this requirement is to give the petitioner an opportunity to challenge the decision before it is finalized. *Baruth v. Gardner*, 110 Idaho 156, 159-60, 715 P.2d 369, 371-72 (Ct. App. 1986). Thus, this requirement is strict; it makes no difference whether the petitioner's claims are meritorious or not. *Cherniwchan v. State*, 99 Idaho 128, 129-30, 578 P.2d 244, 245-46 (1978). Moreover, vague notice of the district court's intent to dismiss is insufficient. The district court must be specific as to the bases for the intended dismissal so as to provide the petitioner with a *meaningful* opportunity to respond. *Banks v. State*, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993). It is not sufficient to merely recite the language from section 19-4906 and state a conclusion. *Id.* If the district court fails to give the petitioner the required notice and opportunity to respond, or if the district court's notice is impermissibly vague, the petition must be reinstated. *Peltier*, 119 Idaho at 456-57, 458, 808 P.2d at 375-76, 377 (failure to give any notice); *Banks*, 123 Idaho at 954, 855 P.2d at 39 (notice was impermissibly vague).

[18] The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996).

If the district court orders dismissal in response to a *sufficiently specific* motion, it need not provide the petitioner with notice and an opportunity to respond because the motion itself is viewed as providing notice to the petitioner. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); *Baruth*, 110 Idaho at 159, 715 P.2d at 372. In such cases, however, the motion must be specific as to the bases for the requested dismissal—again, to provide the petitioner with a meaningful opportunity to respond. *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798 ("[T]he state's prayer for relief in the Answer was deficient for not stating its grounds with particularity, and for not stating that it was the state's motion for summary disposition under I.C. § 19-4906(c)."). *Cf. Banks*, 123 Idaho at 954, 855 P.2d at 39 (although discussing *sua sponte* dismissals, noting that echoing the legal standard set forth in the statute, then concluding that the petitioner is not entitled to relief, is not sufficiently specific notice of the reason(s) for dismissal). If the motion is not specific, any dismissal granted by the district court will be treated as a *sua sponte* dismissal and will be subject to the notice requirement of I.C. § 19-4906(b). *Martinez*, 126 Idaho at 818, 892 P.2d at 493. Likewise, if the district court dismisses a petition on grounds other than those stated in the motion, it too will be treated as a *sua sponte* dismissal subject to the notice requirement. *Baruth*, 110 Idaho at 159, 715 P.2d at 372.

C. Although Mr. Melton's Successive Petition Asserts Claims That Were "Already Raised And Decided In The Previous Post-Conviction Matter," That Fact Did Not Require Summary Dismissal

As noted above, the district court's first stated reason for summarily dismissing Mr. Melton's successive petition was that Mr. Melton's claims regarding the State coercing C.M. to commit perjury "was already raised and decided in the previous post-

conviction matter" and, because Mr. Melton's "own statements [to his trial counsel, at the change of plea hearing, and at the evidentiary hearing in his first post-conviction case] affirm his guilt of this crime, . . . there is no new justification for granting him the relief sought." (R., pp.98-101.) Thus, it appears that the district court took the view that there is a *per se* rule against re-litigating previously-considered post-conviction claims, and that the only possible basis for a successive petition is the presentation of new arguments by the petitioner.[19] This view, however, is incorrect.

The UPCPA provides that, generally, only one petition for post-conviction relief is allowed. I.C. § 19-4908. There is an exception, however, for situations in which there is "a ground for relief asserted [in a successive petition] which for *sufficient reason* was not asserted or *was inadequately raised* in the original, supplemental, or amended application." *Id.* Idaho's appellate courts have consistently held that the ineffective assistance of post-conviction is just such a "sufficient reason" for the petitioner to raise or re-raise claims through successive petitions for post-conviction relief. Indeed, on the issue of inadequately-raised claims (as opposed to un-asserted claims),[20] the Court of Appeals recently held as follows:

> A successive petition for post-conviction relief may be summarily dismissed if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding. I.C. § 19-4908. *Such grounds may*

[19] For purposes of the following analysis, Mr. Melton assumes, without conceding, that the State's *res judicata* argument (*see* State's Memorandum, pp.17-19) was sufficient to provide him with adequate notice of this reason for the district court to have summarily dismissed his Successive Petition.

[20] It is Mr. Melton's contention that his post-conviction counsel was ineffective for failing to adequately raise his claims regarding the coercion/coaching of C.M.'s testimony because, despite the fact that post-conviction counsel failed to explicitly state those claims in Mr. Melton's Amended Petition, they were apparently incorporated therein by reference; they were tried by the State's consent at Mr. Melton's evidentiary hearing; and they were ruled upon by the district court in *Melton II*. However, even if the State was somehow correct when it argued below that those claims were not properly before the district court in *Melton II* because they were not explicitly stated in Mr. Melton's Amended Petition (*see* State's Memorandum, p.13), Mr. Melton would argue that his post-conviction counsel was still ineffective for failing to assert those claims on his behalf.

> *be re-litigated, however, if the petitioner shows sufficient reason why they were inadequately presented in the original case. Id. Therefore, although a claim of ineffective post-conviction counsel, standing alone, is not grounds for post-conviction relief, an allegation that a claim was not adequately presented in the first post-conviction action due to the deficiency of prior post-conviction counsel, if true, provides sufficient reason to permit the claims to be presented again in a subsequent petition.*

Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (emphasis added).[21] In *Griffin*, the district court had summarily dismissed the petitioner's successive petition based on reasoning that was virtually identical that which was employed by the district court in this case: "It does not appear that any new issues have been presented. . . . [T]his Court hereby notifies the above parties of its intention to dismiss the application for post-conviction relief . . . because it is a successive application raising issues already adjudicated which is not permitted." *Griffin*, 142 Idaho at 440, 128 P.3d at 977. Under these circumstances (and in light of the standard articulated above), the Court of Appeals held that the district "court's notice of intent to dismiss was insufficient or erroneous because the court did not give proper consideration to Griffin's allegation that his first post-conviction action was dismissed due to the ineffective assistance of post-conviction counsel," and it vacated the district court's dismissal order and remanded the case. *Id.* at 441-42, 128 P.3d at 978-79.

[21] *See also Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005) ("An allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief."); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999) (holding that successive petitions are allowed not only where the ineffectiveness of prior post-conviction counsel causes issues not to be raised at all, but also where such ineffectiveness causes issues to be raised inadequately); *Palmer v. Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981) (holding that the ineffectiveness of prior post-conviction counsel which causes certain allegations not to be raised would, if true, provide a basis to raise those allegations in a successive petition for post-conviction relief).

Taken together, *Griffin* and its predecessors make it clear that there is no *per se* rule against re-litigating previously-considered post-conviction claims. Accordingly, the district court erred in summarily dismissing Mr. Melton's successive petition on that basis.

D. Because Mr. Melton Raised A Genuine Issue Of Material Fact As To The Ineffective Assistance Of His Post-Conviction Counsel, The District Court Erred In Summarily Dismissing His Successive Petition For Failing To Meet His Burden In This Regard

Having determined that a successive petition for post-conviction relief is validly premised on the allegation that prior post-conviction counsel rendered ineffective assistance which caused certain issues to be inadequately raised in the prior post-conviction proceeding (*see* Part II(C), above), the next question that becomes relevant is whether Mr. Melton met his burden of raising a genuine issue of material fact as to whether his post-conviction counsel was ineffective in *Melton II* for failing to adequately raise his claims regarding the State's coercion/coaching of C.M.'s testimony. This question implicates the district court's second and third stated reasons for summarily dismissing Mr. Melton's Successive Petition: its conclusion that Mr. Melton presented no evidence with his Successive Petition to show that his post-conviction counsel knew of evidence which could have changed the outcome of *Melton II*.[22] (R., pp.98; 102-03.) Specifically, the district court found that Mr. Melton's Successive Petition was accompanied by only two letters from C.M., one of which appeared to have been created more than ten months after the evidentiary hearing in the first post-conviction

[22] Interestingly, at one point, even the district court seems to concede that its claim that Mr. Melton offered "no evidence" is somewhat overstated: "[T]he only piece of evidence supporting Melton's assertions is an unsworn, and uncorroborated letter purporting to be from his daughter, claiming that portions of her testimony was untrue or coerced. However, this one piece of evidence on its own is not enough to justify an evidentiary hearing." (R., p.96.)

case, and that Mr. Melton offered no evidence that these letters had ever been provided to Mr. Melton's post-conviction counsel. (R., pp.102-03.) Therefore, the district court concluded, Mr. Melton had failed to show either that his post-conviction counsel rendered deficient performance, or that any such deficient performance affected the outcome of the first post-conviction case. (R., p.103; *see also* R., pp.100-01 (reiterating the district court's view, first stated in *Melton II*, that any coercion/coaching of C.M. is irrelevant since Mr. Melton's own statements "affirm his guilt of this crime").)

Below, Mr. Melton discusses post conviction counsel's performance in light of both the deficient performance and prejudice prongs of the *Strickland* standard.[23] He contends that he has satisfied his burden of raising genuine issues of material as to each and, therefore, is entitled to an evidentiary hearing.

1. Mr. Melton Raised A Genuine Issue Of Material Fact As To The Deficient Performance Of His Post-Conviction Counsel

As noted, the district court concluded that Mr. Melton had failed to show that his post-conviction counsel had rendered deficient performance because: (a) the only pieces of evidence offered in support of Mr. Melton's Successive Petition were two letters, apparently written by C.M.; (b) one of those letters was created after Mr. Melton's evidentiary hearing; (c) Mr. Melton failed to prove when the other letter was created; and (d) and Mr. Melton failed to prove that his post-conviction counsel had

[23] Because effective assistance of counsel in post-conviction proceedings is not a right protected by the Sixth Amendment and, therefore, a claim of ineffective assistance of post-conviction counsel is not recognized as an independent claim for relief, *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987), the *Strickland* standard is not Constitutionally required when determining whether a petitioner has a valid basis to file a successive petition for post-conviction relief based on the ineffective assistance of his post-conviction counsel. However, in the absence of any other standard for analyzing the ineffectiveness of post-conviction counsel, Mr. Melton contends that the most logical solution is to apply *Strickland's* two-pronged test.

seen those letters. (R., pp.102-03; *see also* R., pp.95; 96; 101-02 (betraying the fact that the district court had already judged the evidence and found Mr. Melton's evidence to lack credibility and, furthermore, viewing that evidence in a light most favorable to the State).) Mr. Melton submits that the district court's conclusions are flawed in two respects: first, the district court took too narrow a view of the evidence Mr. Melton submitted in conjunction with his Successive Petition; and second, the district court lost sight of the fact that Mr. Melton's only burden at this stage of the proceedings was to raise a genuine issue of material fact, not prove his case.

Turning first to the evidence that Mr. Melton offered in support of his Successive Petition, while Mr. Melton readily admits that the two letters from C.M. are the most powerful pieces of evidence, they are not the *only* evidence he offered. Mr. Melton's Third Affidavit explicitly states that: (a) post-conviction counsel had received letters from potential witnesses expressing their willingness to testify and disclosing their anticipated testimony (R., p.9); (b) C.M.'s mother was willing to testify that her daughter had been told by the prosecutor what to say on the witness stand and that she (the mother) had been threatened with the loss of her children if she testified on Mr. Melton's behalf (R., p.10); (c) post-conviction counsel was specifically informed that C.M. was willing to testify that the State had forced her to give a false report and to perjure herself at Mr. Melton's preliminary hearing (R., p.10); and (d) Mr. Melton specifically asked his post-conviction counsel to call C.M., C.M.'s mother, Ms. Moon, Officer Gear, and the prosecutor to testify at the evidentiary hearing, as all five of them could have corroborated Mr. Melton's allegations about the State's coercion/coaching of C.M. Thus, even if Mr. Melton's post-conviction counsel did not have both of C.M.'s letters in

his possession at the time of the evidentiary hearing, he did provide the district court with evidence that his trial counsel was on notice as to the nature of Mr. Melton's claim, and the people whose testimony would be required to effectively assert that claim, when he failed to call any of those people to testify at the evidentiary hearing. *See* I.C. §§19-4903, -4906 (making it clear that the petitioner's affidavit, stating facts within the petitioner's knowledge, can be sufficient evidence to raise a genuine issue of material fact). Moreover, since one of C.M.'s letters is undated and Mr. Melton's Third Affidavit explicitly states that his counsel was on notice that C.M. had recanted her preliminary hearing testimony, the district court was obligated to infer that post-conviction counsel did have that letter in his possession prior to the evidentiary hearing. *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) (holding that when the State files a motion for summary dismissal, the district court must liberally construe the facts and draw reasonable inferences in favor of the petitioner). Together, all of this evidence raised a genuine issue of fact as to whether Mr. Melton's post-conviction counsel rendered deficient performance for failing to offer any evidence tending to corroborate Mr. Melton's own testimony. Thus, the district court erred when it concluded that Mr. Melton had failed to present sufficient evidence of his post-conviction counsel's deficient performance.

The district court also erred in holding Mr. Melton to a burden that exceeds that which ought to have been applied under the UPCPA. The question for the district court at this stage of the proceedings should have been as follows: construing the facts and drawing all reasonable inferences in Mr. Melton's favor, did Mr. Melton raise a genuine issue of material fact as to his post-conviction counsel's deficient performance?

I.C. § 19-4906; *Small* 132 Idaho at 331, 971 P.2d at 1155. However, that is not the inquiry that was undertaken. Rather, the district court prematurely weighed the evidence, drew inferences in favor of the *State*, and concluded that Mr. Melton had failed to *prove* that his post-conviction counsel had rendered deficient performance.

Initially, the district court made it very clear that it doubted the veracity of the letters signed by C.M. by: repeatedly saying that those letters were "purported" to be from C.M. (R., pp.95; 96; *see also* R., p.101); repeatedly pointing out that those letters were "unsworn" (R., pp.96; 101); claiming (incorrectly) that those letters were "uncorroborated" (R., p.96); and contending that Mr. Melton had not laid a foundation "to substantiate his claim that the letters are from his daughter." (R., p.101.)

The district court then went on to construe the letters in a light most favorable to the State, not Mr. Melton. With regard to the undated letter, the district court focused on the portion of that letter in which C.M. indicated that, "it" happened two or three times, and construed "it" to be "the abuse," *i.e.*, the lewd conduct for which Mr. Melton had been convicted, even though young C.M. never indicated what "it" was and, in fact, "it" might not have been conduct that met the definition of lewd conduct.[24] (R., pp.101-02.) With regard to the dated letter, the district court focused on the portion of that letter in which C.M. indicated that "some" of her prior statements about her father were true, not the portion in which C.M. stated that "most" of her prior statements were false. (R., p.102.) Taking the letters together, the district court disregarded the fact that they

[24] One of Mr. Melton's claims in *Melton II* was that his actions with C.M. constituted the lesser offense of sexual abuse of a child under the age of sixteen (I.C. § 18-1506), but not the charged offense of lewd conduct with a child under the age of sixteen (I.C. § 18-1508). (*See Melton II* R., pp.27-30; First Affidavit, pp.10-11P; *cf., e.g., Melton II* Tr., p.76, Ls.18-20; p.89, Ls.3-17; p.96, Ls.15-18 (providing inconsistent testimony as to the exact nature of the sexual contact, but at times testifying as to contact that would meet the definition of sexual abuse, but not lewd conduct).)

show that "most" of what C.M. told the authorities about Mr. Melton was false; that her preliminary hearing testimony had come directly from the mouth of the prosecutor; that she had lied because the prosecutor threatened to take her away from her mother and put her in foster care; and that other representatives of the State forced her to exaggerate the facts while writing her victim impact statement. (R., pp.101-02.) In other words, the district court neglected to consider that if the facts are construed liberally and all reasonable inferences are drawn in favor of Mr. Melton, there is compelling evidence to suggest that C.M. was coerced and coached, and that Mr. Melton's actions, while perhaps still criminal, are not nearly as egregious as his conviction and sentence would seem to indicate.

Ultimately, because the district court construed the evidence in the light most favorable to the State, and simply believed Mr. Melton to be guilty of the crime for which he had been convicted, it concluded that his evidence had failed to show that the "crux of [C.M.'s] past statements or testimony were false" or "in any way establish [his] innocence." (R., p.102.) However, regardless of whether Mr. Melton *proved* his claim, and regardless of what the district court believed about Mr. Melton's guilt or innocence, the reality is that Mr. Melton did raise a genuine issue of material fact as to whether C.M.'s statements and testimony had been manufactured by the prosecution, whether his conviction and sentence are based on false evidence, and, therefore, whether his post-conviction counsel was ineffective for failing to present readily-available evidence of the misconduct that had occurred at trial.

2. Mr. Melton Raised A Genuine Issue Of Material Fact As To Whether He Was Prejudiced By The Deficient Performance Of His Post-Conviction Counsel

The district court also concluded that Mr. Melton had failed to show that his post-conviction counsel's deficient performance, if any, prejudiced his first post-conviction case because, in the district court's view, Mr. Melton was guilty as charged any way. (R., p.103; *see also* R., pp.100-01 (reiterating the district court's view, first stated in *Melton II*, that any coercion/coaching of C.M. is irrelevant since Mr. Melton's own statements "affirm his guilt of this crime").) This conclusion on the part of the district court was incorrect for a number of reasons. First, although Mr. Melton freely admits that he is guilty of a crime, there is an open question as to what crime he is factually guilty of having committed. (*See* note 24, *supra* (explaining Mr. Melton's contention that he is guilty of sexual abuse, not lewd conduct, and discussing evidence that supports that contention).) Second, insofar as the prejudice question boils down to whether post-conviction counsel's errors prevented Mr. Melton from successfully arguing that he would not have been found guilty at trial, the district court's assumption that he would have inevitably been found guilty—whether that assumption is based on the confidential admissions he had made to his counsel (*see* note 5, *supra*), or the admissions he made subsequent to the misconduct which is now at issue (*e.g.*, admissions made at the change of plea hearing or sentencing, during the pre-sentence investigation, or in subsequent proceedings)—is without merit since the evidence relied upon by the district court would never have come about but for the prosecutorial misconduct complained of. Third, insofar as the prejudice question boils down to whether post-conviction counsel's errors prevented Mr. Melton from successfully arguing that he would not have pled

guilty, the district court's assumption that he would have inevitably been found guilty is largely irrelevant. *Cf. McKeeth v. State*, 140 Idaho 847, 852-53, 103 P.3d 460, 465-66 (2004) (dealing with guilty pleas entered upon the erroneous advice of counsel, but holding that prejudice is shown by demonstrating that but for the error complained of, there is a reasonable probability that the petitioner would not have pled guilty).

In the present case, had post-conviction counsel properly presented Mr. Melton's claim, Mr. Melton arguably could have shown that he would not have pled guilty but for the State's misconduct in coercing/coaching C.M.'s false testimony.

In light of the foregoing, Mr. Melton contends that he ought to have been provided an evidentiary hearing on his Successive Petition.

CONCLUSION

For the foregoing reasons, Mr. Melton respectfully requests that this Court vacate the district court's order summarily dismissing his Successive Petition and remand his case with an instruction that counsel be appointed and that the district court conduct an evidentiary hearing.

DATED this 18th day of December, 2007.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

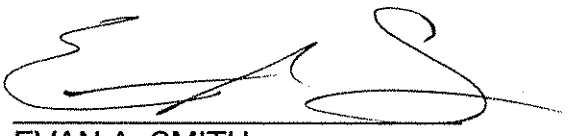
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of December, 2007, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

RAYMOND JULIUS MELTON
INMATE # 72229
BCCF
2600 S SUNSET AVE
LITTLEFIELD TX 79339

BARRY WOOD
DISTRICT COURT JUDGE
GOODING COUNTY DISTRICT COURT
PO BOX 27
GOODING ID 83330

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Legal Secretary

ERL/eas